Filed 7/3/12 P. v. Garcia CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS GARCIA, Defendant and Appellant.	B232933 (Los Angeles County Super. Ct. No. GA079522)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Nicholas Garcia, appeals from a judgment of conviction entered after a jury found him guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).[1] The jury also found true the allegation that appellant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)). Appellant admitted that he had suffered a prior felony conviction of first degree burglary (§ 459) within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). After denying appellant's *Romero*[2] motion, the trial court sentenced appellant to nine years in state prison, consisting of the low term of two years on the assault charge doubled pursuant to the Three Strikes law to four years, plus a five-year serious felony enhancement (§ 667, subd. (a)(1)). The court struck the punishment for the great bodily injury enhancement (§ 12022.7, subd. (a)).

Appellant contends he received ineffective assistance of counsel when his attorney failed to request a jury instruction on the defense of accident. Appellant also contends that the trial court abused its discretion in refusing to strike his prior felony strike. We reject these contentions and affirm the judgment.

FACTS

Prosecution Case

On the evening of February 17, 2010, Stephen Soto, Daniel Ying, Kevin Chu, and Taylor Reicheun were drinking beer at Al's Bar in San Gabriel. Around midnight, they walked across the street to Sharky's Sports Bar to play pool and entered Sharky's through a parking lot at the rear of the building. Steven Sanchez, who was familiar with Stephen Soto, was smoking a cigarette in the parking lot when the group arrived. Soto and Ying appeared to be intoxicated. Chu was driving that night and only had one or two beers.

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Sanchez had consumed only about half a beer in Sharky's before coming outside to the parking lot.

Appellant came out of the rear door of Sharky's drinking from a glass pitcher containing beer. He appeared to be intoxicated and approached Soto and the others in the parking lot. Someone in Soto's group told appellant that it was illegal to drink on the street and that he should take the pitcher back inside. Appellant angrily responded "Oh, I'm not small. What are you trying to say? I've done time. I can take care of myself." Appellant then stated that he was going to "slap each and every one" in Soto's group. Soto approached appellant and told him he would not be slapping anyone. Soto, Ying, Chu and Reicheun walked into Sharky's and appellant remained in the parking lot and continued to drink from the pitcher. Sanchez also remained in the parking lot to finish his cigarette and tried to ignore appellant who was hostile towards him.

A couple of minutes later, Sanchez saw Ying come out of the bar to the parking lot. Ying and appellant approached one another and engaged in a verbal confrontation. The confrontation escalated and Ying and appellant began wrestling. Sanchez attempted to break up the fight. Soto, who arrived in the parking lot as appellant and Ying were rising from the ground, approached appellant and yelled at him. A few seconds later, appellant's friend whom Sanchez had observed coming out of the bar closely behind Soto, punched Soto in the face. Soto responded by punching appellant's friend in the face. As Soto and appellant's friend were engaged in this physical confrontation, appellant approached Soto from behind and struck him on the head with the glass beer pitcher, causing it to shatter into pieces. Soto touched the back of his head and found that it was bleeding. Appellant and his friend who had punched Soto in the face left together in the same car.

San Gabriel Police Officer Vy Van responded to a call regarding a fight at Sharky's Bar in the early hours of February 18, 2010. Officer Van noticed that Soto had a three-inch laceration on the top of his head and blood was coming down the left side and back of his head. As a result of the attack, Soto suffered a concussion and was

treated at the hospital where he received 14 staples to close the head wound. Soto suffered memory loss and had headaches for four to five months after the attack.

San Gabriel Police Officer Andy Texeira also responded to the scene. As part of his investigation he went to the San Gabriel Valley Medical Center which was located directly across the street from Sharky's Bar. Officer Texeira met with appellant who was "extremely agitated, uncooperative," and "under the influence of alcohol." Officer Texeira observed that appellant's right hand was "bleeding profusely." All four fingers were sliced open and blood was seeping through a towel that appellant had wrapped around his hand.

On February 23, 2010, Detective Allen Sam of the San Gabriel Police Department met with Soto and showed him a photographic six-pack. Soto identified appellant as the person he saw holding the glass pitcher. Chu was shown a photographic lineup and circled appellant's picture and identified him as "the person that hit my friend with the glass pitcher." Sanchez identified appellant as the person who "hit Stephen [Soto] over the head with a pitcher."

Defense Case

Appellant testified on his own behalf. He drank three or four beers at home and then walked to Sharky's Bar to play pool. While there he drank a few more beers and bought a pitcher of beer for a friend from high school. When his friend left he took the pitcher with the remaining beer and went outside to smoke a cigarette. A group of four or five men approached him in the parking lot. An argument started but he cannot remember how it was initiated because he was intoxicated.

Appellant remembered that the group of men left and then returned a few moments later. He was drinking from the pitcher and smoking a cigarette as the group of men approached him. At least three people were close to him and one grabbed his shirt as he was being pushed towards the street. Appellant remembered being hit a few times as he was pushed around and struggled to keep his balance. As he tried to get away from the men he swung his right hand holding the pitcher. He felt a sharp pain in his right hand and saw that there was blood coming from it. At that point he testified that he

"really wasn't that concerned" whether the pitcher had hit someone because he was in shock and wanted to move towards the bar to get away from the group of men.

Appellant recognized someone that he had seen playing pool earlier and asked for help. That person gave appellant a shirt to wrap his bloody hand and drove him to the hospital. At the hospital, he told Officer Texeira he had been at a bar earlier but did not tell him that he sustained the injury when he had been surrounded by a group of men and accidentally swung and broke a glass pitcher.

A week later Officer Texeira interviewed appellant regarding the incident and appellant said he got into an argument with some men. They pushed and attacked him. In trying to get away from them, he felt a pain in his hand and realized he had broken the glass pitcher. Appellant testified that he did not use the pitcher as a weapon or in self-defense and that contact with a member of the group "just sort of happened."

Rebuttal

Officer Texeira testified that when he contacted appellant at the hospital and inquired as to how he sustained the hand injury, appellant told him that he had been at a bar and felt a sharp pain in his hand. Appellant saw that his hand was bleeding and believed he got it caught in a door. When Officer Texeira followed up on this explanation, appellant responded "I already told you my hand got slammed in the door."

DISCUSSSION

I. The Failure to Request a Jury Instruction on Accident Did Not Violate Appellant's Right to Effective Assistance of Counsel

A. Contention

Appellant contends that trial counsel provided ineffective representation in failing to request a jury instruction on the defense of accident in accordance with Judicial Council of California Criminal Jury Instructions, CALCRIM No. 3404.[3] Appellant

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[3] CALCRIM No. 3404 provides in part as follows (as to general or specific intent crimes): "[The defendant is not guilty of _____ <*insert crime*[*s*]> if (he/she) acted

contends instruction on the accident defense was required because he relied on the defense at trial and there was substantial evidence supporting it.

B. Relevant Authority

To prevail on a claim of ineffective assistance of counsel, first, appellant must establish that "'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216 quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688.)

Second, appellant must show prejudice. Specifically, appellant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450–451.)

Finally, we note that we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by [appellant] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra,* 466 U.S. at p. 697.)

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Assault is a general intent crime that does not require a specific intent to injure the victim or a subjective awareness of the risk that an injury might occur. (*People v. Williams* (2001) 26 Cal.4th 779, 788, 790.)

"Penal Code section 26 states the statutory defense [of accident]: 'All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five–Persons who committed the act or made the omission charged through misfortune

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[or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime*[*s*]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]"

or by accident, when it appears that there was no evil design, intention, or culpable negligence.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 996.)

C. Analysis

In this case, appellant's claim fails for a lack of prejudice. Appellant's version of events was that he was attacked by several men and in the process of trying to get away, the pitcher in his hand accidentally broke and he sustained injuries to his hand. Witnesses Sanchez and Chu testified that he swung the pitcher and hit Soto in the head with it. The primary dispute was whether appellant acted intentionally or accidentally, and the resolution of this dispute was based on credibility, a determination for the jury to make.

The jury was instructed pursuant to CALCRIM No. 875 on the elements of the charged offense. To find appellant guilty of assault with a deadly weapon, the People were required to prove beyond a reasonable doubt that: "1. [Appellant] did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. [Appellant] did that act willfully; [¶] 3. When [appellant] acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When [appellant] acted, he had the present ability to apply force with a deadly weapon other than a firearm to a person."

The jury was also instructed: "Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] The touching can be done indirectly by causing an object to touch the other person. [¶] The People are not required to prove that [appellant] actually touched someone. [¶] The People are not required to prove that [appellant] actually intended to use force against someone when he acted. [¶] No one needs to

actually have been injured by [appellant's] act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether [appellant] committed an assault, and if so, what kind of assault it was. [¶] Voluntary intoxication is not a defense to assault."

Pursuant to CALCRIM No. 250, the jury was instructed that the crimes charged required "proof of the union, or joint operation, of act and wrongful intent" and that "to find a person guilty of the crime of assault with a deadly weapon . . . that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law." The jury was also instructed pursuant to CALCRIM No. 200 to consider all of the instructions together.

Based on the instructions given, had the jury believed appellant's version of events, it could not have found him guilty of assault with a deadly weapon. The jury rejected appellant's version of events and necessarily found that he acted willfully. Because the factual question posed by the omitted "accident" instruction was resolved adversely to appellant under other proper instructions, the failure to give the instruction was harmless. (*People v. Sedeno* (1974) 10 Cal.3d 703, 721.) It is not reasonably probable that the result would have been any different had the instruction been given (*People v. Watson* (1956) 46 Cal.2d 818, 836). We are also satisfied that the failure to give the accident instruction did not contribute to the verdict (*Chapman v. California* (1967) 386 U.S. 18, 24.)

As no prejudice resulted from appellant's trial counsel's failure to request a jury instruction on the defense of accident, we need not address whether counsel's performance fell below the standard of reasonable effective assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

II. The Trial Court Properly Exercised Its Discretion in Denying Appellant's Motion to Dismiss His Prior Strike

A. Contention

Appellant contends that the trial court abused its discretion by refusing to dismiss his prior strike because it was not a crime of violence and it fell outside the spirit of the Three Strikes law.

B. Relevant Authority

In *Romero*, the California Supreme Court held that a trial court may strike an allegation under the Three Strikes law that a defendant has previously been convicted of a serious or violent felony "'in furtherance of justice'" under section 1385, subdivision (a). (*People v. Williams* (1998) 17 Cal.4th 148, 159 (*Williams*).) The term """'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]""" (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 530.) In deciding whether to strike a prior conviction, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra,* at p. 161.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in deciding to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Id.* at p. 378.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376–377.)

C. Analysis

There is no showing that the trial court was either unaware of its discretion or considered impermissible factors. We cannot say that its ruling was irrational or arbitrary. The record shows that the trial court considered counsels' arguments, as well as appellant's criminal history.

Appellant's prior strike conviction in 2004 was for burglary, for which he received a sentence of one year. Appellant contends that the key fact which convinced the court to refuse to strike the strike was the court's misunderstanding that the prior burglary was a violent felony. But that oversimplifies and misstates the analysis conducted by the trial court. Although counsel downplays the seriousness of appellant's prior burglary, the court suspected that it involved "more than just going into a neighbor's house" and noted that appellant took a firearm from the residence. Furthermore, it appears from the record that the nature of appellant's current offense influenced the court's reasoning. The court stated that it would have been more inclined to consider striking the prior "had the current case been something different like some sort of petty theft or something that's not a crime of violence."

The specific facts of the prior burglary are not clear from the record here but we do not have to determine whether or not it was a violent felony. The trial court's

characterization of the prior felony strike is not dispositive. "[T]he Three Strikes law does not require *multiple* violent felony offenses to come within the statutory scheme. *Williams*[, *supra*, 17 Cal.4th 148] and its progeny do not hold that a defendant's criminal career must consist entirely or principally of *violent* or serious felonies to bring a defendant within the spirit of the Three Strikes law." (*People v. Strong* (2001) 87 Cal.App.4th 328, 340, second italics added.)

Based on the violent nature of the present conviction and the fact that appellant's prior burglary constituted a strike, it was far from irrational for the court to refuse to treat appellant as if he had not previously suffered a strike. Accordingly, we find no abuse of discretion in the trial court's determination.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ